No. 348

SEP 16 195

HAROLD B. WILLEY,

Supreme Court of the United States

GEORGE KEMP REAL ESTATE COMPANY,
Petitioner,

346 U.S.
GEO-GRA
46

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI.

ALEXANDER S. ANDREWS,
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THE REPORTER COMPANY, INC., New York City—1953

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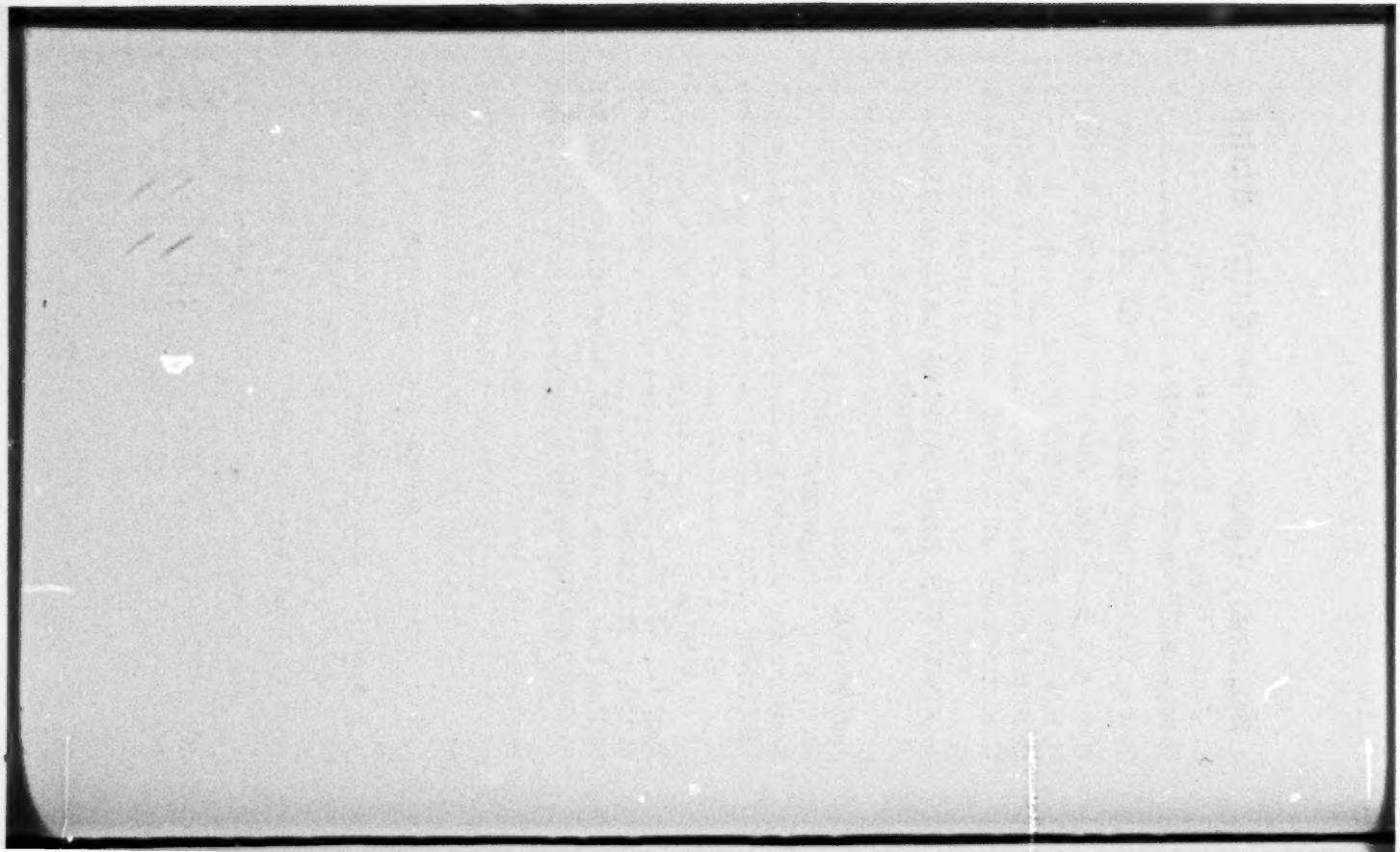
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Supreme Court of the United States

GEORGE KEMP REAL ESTATE COMPANY, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, respondent.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES AND THE JUSTICES THEREOF:

GEORGE KEMP REAL ESTATE COMPANY, a New York corporation incorporated in 1902 now in liquidation, respectfully petitions this Court for writ of certiorari to review the order herein on June 18th 1953 of the Court of Appeals for the Second Circuit affirming a Tax Court decision (Judge Arundell) after trial of a severed preliminary issue of collateral estoppel (17 T. C. 755).

The question presented is whether a Tax Court decision (12 T. C. 943) by Judge Hill (denying refund of excess profits tax for 1940) is *res judicata* (collateral estoppel) as respects this later new cause of action for refund of like taxes for later years (1941-1944).

Both suits were brought for relief under IRC §722 (a) (b) (5).

The second suit was not tried on the merits but only on the said preliminary issue of collateral estoppel; which estoppel Judge Arundell upheld, and the Court of Ap-

(NOTE: In this petition and attached brief the page references to the *certified* record in the *first* proceeding (Exh. A herein), and to the *printed* appeal record in the *first* proceeding (C. A. Docket No. 21497), and to the *certified* record in this *second* proceeding, and to the *printed* record in this *second* proceeding (all four of which are on file in the Court of Appeals), are respectively indicated by "CR1," "PR1," "CR2," and "a.")

peals by decision reported in 205 F. 2d 236 (A. N. Hand, Chase, Clark, JJ) affirmed on his opinion; which this petition now seeks to review.

Judge Hill found on undisputed evidence (largely stipulated) facts apparently entitling petitioner to relief (see Points VI and VIII), but without express finding of our normal base period income or of the measure of its inadequacy or of our fair constructive income, notwithstanding uncontradicted proof supporting all those matters. But at that point Judge Hill digressed to say that §722 subdiv. (b)(5) requires (as it does) that relief thereunder must not be inconsistent with any previous subdivision; and that subdiv. (b)(3) requires proof (as it does for those within its provisions) that taxpayer's business cycle differs materially in length and amplitude from the general business cycle or that his sporadic and intermittent periods of high production and profits were inadequately represented in the base period; and Judge Hill concluded therefrom that any relief to us would be inconsistent with subdiv. (b)(3) because we had not proved that our business cycle differed materially in length and amplitude from the general business cycle (PR1 p. 69).

But as subdiv. (b)(3) applies only to "members of an industry" (see Point VI), Judge Hill must, unless he was discussing utter irrelevancies, have assumed that petitioner was a member of an industry;—an assumption which was untrue as proved in this second suit and without support in the first suit; for (as found by Judge Hill) petitioner was merely the owner of two lots on Fifth Avenue New York City both leased many years ago for a century at fixed net rentals (see Point VII).

That false assumption (and the hint or suggestion mentioned below) was the whole basis for Judge Hill's decision.

On appeal from Judge Hill the Court of Appeals dismissed for lack of jurisdiction under IRC §732(c) which

was held applicable to pure questions of law, and to remain unrepealed despite later laws believed repugnant to it (182 F. 2d 847). The Supreme Court denied certiorari (340 U. S. 852); so that Judge Hill's decision was never reviewed or reviewable.

We submit that Judge Hill's decision should not have been held to estop a different cause of action for later tax years, because essentially his ground, unless entirely irrelevant, was an assumption, never in issue, never litigated, never found or decided, which was false and was unjust for all those reasons, and was wholly on a collateral matter heretofore known as a "mediate datum" in distinction to ultimate fact; and he failed to make any findings of ultimate data essential for disposition on the merits.

Each of those features (the one on mediate datum was only by denial of certiorari) this court has held to prevent collateral estoppel (see Points I-III); and no case until this one has to our knowledge questioned it.

Both of our suits were framed to rely on petitioner's normal base period income and the measure of its inadequacy—a factor which was unchangeable; and if it had been clearly and distinctly found in the first suit, collateral estoppel would doubtless have resulted except for unreviewability which would have prevented as Prof. Scott holds (56 Har. L. R. 15, 16, *infra* Point I), and also Restatement "Judgments" §69 ("(2) Where a party to a judgment cannot obtain the decision of an Appellate Court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent cause of action against him on a different cause of action.").

But Judge Hill never found any facts in that regard, either in his formal findings or elsewhere, and his said hint or suggestion in his opinion (made indirectly as an incident to distinguishing an earlier opinion in a railroad

case) was that the temporary reduction on *part* of the premises, which reduction he found was granted solely to save our tenant from bankruptcy, established a superseding normality test for the *entire* premises, despite the merely temporary interruption of the original rental, and despite incompatibility (with normality) of its purpose as found (viz avoidance of bankruptcy), and despite the other part of the same "unified building" having, as part of the same transaction, been simultaneously bought by petitioner from tenant and leased back to the same tenant for the same term at *double* the temporary rental rate of the other part—the latter circumstance being in fact the only one having any conceivable relation to normal rent since it was currently made as a new investment to help our tenant with needed cash (see Point VIII).

In short, Judge Hill's search produced what he believed was an inconsistency i.e. a fundamental obstacle to any relief whatever; and thereupon he discontinued making useless findings of "ultimate fact"—or rather never even commenced them beyond the above suggestion or hint in his opinion.

The reasons relied on for allowance of the writ are (1) The want of findings on essentials for any decision on the merits; and the assumptions or irrelevancies relied on without issue, trial or finding, and their falsity and utter baselessness; all made a tissue of falsity and injustice, all beyond review, greater than any previously remedied, which should have made impossible any collateral estoppel by decision on the merits (God save the mark!)
(2) The decision below decided a federal question in a way probably in conflict with applicable decisions of this Court; or so far departed, or sanctioned such a departure, from the accepted and usual course of judicial proceedings in respect to collateral estoppel, as to call for an exercise of this Court's power of supervision (Rule XXXVIII,

5(b)). The said decisions of this Court so departed from, are more fully indicated in Points I-III of the annexed brief.

The basis of the Supreme Court's jurisdiction is Int. Rev. Code §1141(a) and Judicial Code §1254 reading as follows:

§1141(a): "* * * and the judgment of any such court" (Court of Appeals) "shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari in the manner provided in §1254 of title 28 of the United States Code."

§1254: "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree * * *"

A brief is attached.

WHEREFORE petitioner prays that a writ of certiorari issue to the Court of Appeals Second Circuit to review the decision below.

September 14, 1953.

Respectfully submitted

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POINT I.

Judge Hill's decision created no collateral estoppel because its entire basis was false, unreviewable and unjust.

U. S. A. v. International Building Co. 345 U. S. 502, 506:

"Certainly the judgments entered are *res judicata* of the tax claims for the years 1933, 1938 and 1939, whether or not the basis of the agreements on which they rest reached the merits. But unless we can say that they were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits."

Commissioner v. Sunnen 333 U. S. 591, 599:

"Collateral estoppel must be used with its limitations carefully in mind *so as to avoid injustice.*"

U. S. v. Silliman 167 F. 2d 607, 614 c.d. 335 U. S. 825:

"Such a rule of public policy must be watched in its application lest a blind adherence to it lead to defeat the even firmer established policy of giving every litigant a full and fair day in court * * * (615) All these instances are, we think, clearly understandable limitations imposed on a general rule to prevent that general rule from working injustice through depriving the party of a chance for a fair hearing * * *"

Developments in the law. Res Judicata. 65 H. L. R. 843:

"Furthermore, if the findings in the initial action, which might themselves be incorrect, can be used in subsequent litigation to prove mediate facts from which further erroneous inferences may be drawn, it would seem that the doctrine of collateral estop-

pel is carried past the limit where the public interest in reducing litigation is outweighed by the injustice in retaining and compounding possible wrong determinations."

Restatement Judgments, §70(f) p. 324: ("Where injustice would result").

Scott, 56 H. L. R. 1, 10, 15-16:

(p. 10) "The original judgment stands, although based upon erroneous holdings as to the law; but insubsequent controversies between the parties based on other causes of action, the Court is not necessarily bound to make the same erroneous holding as to the law."

(pp. 15-16) "A judgment rendered by the trial court may not be conclusive by way of collateral estoppel because the unsuccessful party cannot obtain the decision of the appellate court upon the matter decided adversely to him. The fact that a party who might have appealed fails to do so is immaterial; but the fact that he is unable to appeal is of importance."

U. S. v. Pyne 313 U. S. 127, 130-131:

"When we turn to the opinion of the Court of Claims, it is made clear that absence of such a specific finding was the result of the Court's adoptions of criteria * * * inconsistent with our holding in the Higgins case."

St. John v. Wisconsin Board 340 U. S. 411:

"We need not linger over the propriety of invoking the doctrine of *res judicata* in this type case, for we have a direct holding of the Wisconsin Supreme Court to show us that the District Court's interpretation of the State law as to *res judicata* in this particular case was erroneous * * * Under such circumstances, justice requires that the judgment of the Court below barring appellants from attacking the validity of the Wisconsin Public Utility Anti-Strike Law be vacated" (all the justices agree that the judgment of the State court was not *res judicata.*)

POINT II.

Also because its basis was never in issue, nor litigated, nor directly or clearly found or decided.

Commissioner v. Sunnen supra 333 U. S. 591, 597-8:

> Collateral estoppel can exist "*only* as to those matters *in issue* or *points controverted* upon the *determination of which* the (prior) finding or verdict was rendered" and "*only* as to those matters in the second proceeding which were *actually presented and determined* in the first suit" (p. 598)
> • • •

F. T. C. v. Motion Picture Advertising Co. 344 U. S. 392, 398:

> "The plea of *res judicata* is therefore not available since the issues litigated and determined in the present case are not the same as those in the earlier one. c.f. *Tait v. Western Md. R. Co.* 289 U. S. 620, 623."

Cromwell v. Sac 94 U. S. 351, 353-354:

Restatement "Judgments" §68(2):

> "A judgment in a first cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."

Scott, 56 H. L. R. 1, 2:

> 'In a subsequent controversy between the same parties on a different cause of action involving the same or some of the same questions, the prior judgment is conclusive only as to matters actually litigated and determined.'

50 C. J. S. "Judgments" §§712, 730, 732:

> "• • • Where the second case is on a different cause of action, the prior judgment is *res judicata* or operates as an estoppel only as to matters act-

ually litigated (p. 174) * * * Issues which are not either actually or impliedly adjudicated are not concluded" (p. 176)

'Matters not in issue, are not concluded.'

U. S. v. Silliman supra (Point I):

"Only upon such matters (those actually litigated and determined in the original action) is the judgment conclusive in another action."

Tait v. Western MD. R. R. 289 U. S. 620, 623:

"In the latter (a subsequent cause of action) the inquiry is whether the point or question to be determined is the same as that litigated and determined in the original action."

N. L. R. B. v. Clark 163 F. 2d 373 (2d):

"A case is not decisive of a question which neither the N. L. R. B. nor the Court ruled upon, and which was not argued before the Court, though the question may have lurked in the record."

Syms v. McRitchie 187 F. 2d 915, 918 (5th, 1951):

"In the latter case (a different cause of action) the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the prior action * * * It is of the essence of estoppel by judgment that it be certain that the precise issue raised in the second suit was determined by the former judgment (quoting the *Sunnen* case) * * * If there be any uncertainty in the record as to whether it was so determined, the whole subject matter of the second action will be at large and open to a new contention."

On mediate data:

Developments in the law—*res judicata*: 65 H.L.R. 843.

The Evergreens v. Nunan 141 F. 2d 927 (2d) c.d. 323 U. S. 720; 142 A.L.R. 1243 and Supplementary Note in 152 A.L.R. 1193 on *The Evergreens v. Nunan supra.*

POINT III.

Also because its false or irrelevant basis was not on the merits and cannot substitute for unfound essentials, and no merits basis was left for collateral estoppel.

> *U. S. A. v. International Building Co.* 345 U. S. 502, 506 *supra*:
>
> "But unless we can say that they (the judgments) were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits."
>
> *U. S. v. Pyne* 313 U. S. 127, 130 *supra*:
>
> "Failure of the Court of Claims to make a specific finding on this ultimate and determinative issue deprives that Court's judgment of support."

POINT IV.

Besides compounding the false assumptions and injustices in the first case, Judge Arundell erred (1) in holding Judge Hill's reasons to be irrelevant; (2) and when he nevertheless examined them his conclusions were all erroneous and in part trivial.

1. By IRC §§ 1117-1118 Tax Court opinions must be part of the record; and this Court constantly scrutinizes the whole record where collateral estoppel is in question (*New Orleans v. Citizens Bank* 167 U. S. 371 erroneously cited by Judge Arundell as holding the opposite); *St. John v. Wisconsin Board* 340 U. S. 411 *supra; Dowd v. Cook* 340 U. S. 206, 208; *Commissioner v. Sunnen* 333 U. S. 591 *supra; Angel v. Bullington*

330 U. S. 183, 195 (dis.); *Sealfon v. U. S.* 332 U. S. 575, 579-580; *U. S. v. Pyne* 313 U. S. 127, 130; as also the Courts of Appeals (*Buchanan v. General Motors* 158 F. 2d 728, 729; *U. S. v. Silliman* 167 F. 2d 607, 616; *Olson v. Commissioner* 67 F. 2d 726; *Emerald Oil Co. v. Commissioner* 72 F. 2d 681; *Moran Co. v. Navigazione* 92 F. 2d 37 c.d. 302 U. S. 744; 51 Col. L. R. 785-786).

2. He said (p. 52a) that Judge Hill's consideration of sub (b)(3) was "merely to determine the application of the inconsistency test laid down in sub (b)(5)." Of course, but his introductory word "merely" cannot signify that Judge Hill's application was figurative or illustrative; on the contrary Judge Hill was required by sub (b)(5) to apply the test "to the taxpayer" and that is exactly what he did and is what we complain of.

As respects identity of the two proceedings Judge Arundell said that the "matter raised in the second suit" is whether respondent erred in failing to allow relief, and is "identical in all respects" with "that decided by Judge Hill in the prior suit" and that the "controlling facts" and "applicable legal rules" remain unchanged (pp. 50a, 51a, 53a)—most of which is quite untrue, for the "matter raised in the second suit" is not merely "whether respondent erred in failing to grant relief" but what Judge Hill did, and why, and the two are not identical "in all respects" nor in scarcely any respect, and Judge Arundell's test for identity substitutes generalities for the scrutiny which would disclose details fatal to collateral estoppel. He uses the term "controlling facts" to include untrue and unfound assumptions basic to any inconsistency with subsection (b)(3); and his ambiguous term "applicable legal rules" covers those which Judge Hill applied as well as those which should have been applied, and the two are not "identical in all respects" nor in any respect.

He further erred in holding that there has been no change in the controlling facts; which ignored the assumption (which Judge Hill treated, but did not find, as a fact) proved in this suit to be false; and in saying that the "single fact" we relied on was that the causes of action were different because for different tax years; and in saying or implying that petitioner is seeking to relitigate its claim for the year 1940.

His further conclusion (p. 52a) that Judge Hill's assumption was not equivalent to saying that we were "*engaged in production*" is trivial, for though doubtless true (but we were never engaged in production) it is of no consequence, since although only sub B of (b)(3) mentions 'production' yet as both subs A and B apply exclusively to members of an industry it couldn't matter which of A or B petitioner was in, and Judge Hill necessarily implied that we were a member of an industry even if he didn't imply that we were engaged in production.

Judge Arundell's opinion (p. 41a) seems to think our opening statement ("every fact on which the petitioner relied had been found by this Court (Judge Hill), and that no exception was taken to the facts that were found") meant that Judge Hill's findings were all we asked or wanted. That would be untrue (see our Appendix No. 1). We were well aware that Judge Hill had not found our normal base period income, or its inadequacy or the measure thereof or our fair constructive income. The findings that we were satisfied with were the representations to us by Gimbel and Saks on which we relied.

POINT V.

Distinguishing all authorities applying collateral estoppel.

All decisions known to us which applied collateral estoppel are distinguishable either because both suits were for the same cause of action, whereby all objections, whether actually litigated or not, were concluded:

Angel v. Bullington 330 U. S. 183;
Brown v. W. Ry. of Ala. 338 U. S. 294, 296;
Hughes v. Fetter 341 U. S. 609;
Chicot Co. Drainage Dist. v. Baxter 308 U. S. 371;
Case v. Beauregard 101 U. S. 688;
Frost v. Bankers Commercial Corp. 194 F. 2d 505 (2d);
Buchanan v. Genl. Motors 158 F. 2d 728, 730 (2d);

or, when the causes were separate, the issue was actually litigated and directly and clearly decided in the previous suit:

Sealfon v. U. S. 332 U. S. 575, 579-580;
Tait v. Western Md. Ry. supra 289 U. S. 620, 623, 624;
U. S. v. Moser 266 U. S. 235;
Comm. v. West. U. Tel. Co. 141 Fed. 2d 774 c.d. 322 U. S. 751.

POINT VI.

IRC §722, and petitioner's suit for relief thereunder.

IRC § 722 as amended in 1942 provided in substance that (a) where the taxpayer should establish that the excess profits tax, as computed without the benefit of that section, results in an excessive and discriminatory

tax, and should establish what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for a tax based upon a comparison of normal earnings with (actual) earnings during the tax period, then the tax *"shall"* be determined by using such constructive income in lieu of the actual average net income. Also (b) that (for taxpayers using the average earnings method, as did petitioner) such tax computed without the benefit of this section *"shall be"* considered excessive and discriminatory if its average base-period-net-income was an inadequate standard of normal earnings because of any of five reasons listed below of which Nos. 1, 2, 4 are immaterial here (as also No. 3, though Judge Hill thought otherwise) viz

(1) Where during the base period normal production output or operation was interrupted or diminished because of events unusual in the experience of such taxpayer.

(2) Where the business of taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because an industry of which taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry.

(3) Where the business of the taxpayer was depressed in the base period by conditions generally prevailing in an industry of which taxpayer was a member, subjecting taxpayer to (A) a profits cycle differing materially in length and amplitude from the general business cycle, or (B) sporadic and intermittent periods of high production and profits, and such periods are inadequately represented in the base period.

(4) Where during or immediately prior to the base period taxpayer commenced business or changed the char-

acter of its business and the average base period net income does not reflect the normal operation for the entire base period.

(5) Or because "of any other factor affecting the taxpayer's business which may reasonably be considered as resulting in an inadequate standard of normal earnings during the base period and the application of this section to the taxpayer would not be inconsistent with the principles underlying the provisions of this subsection, and with the conditions and limitations enumerated therein."

Under said subdivisions (a), (b) (5) petitioner filed its claim for refund (of the whole excess profits tax paid for 1940, $1311.75) on the ground that during the base period years its reserved rent ($300,000 per year payable quarterly) as fixed by its long-term net lease of its principal asset, was temporarily (1936-1940) reduced by $50,000 per year on the imperative demand of its tenant to save the tenant from threatened bankruptcy which would have caused petitioner enormous loss and expense viz. loss of its entire rent (not merely $50,000 thereof per year for 4 1/2 years) and payment of local taxes previously borne by the tenant (about $300,000 per year), until a new tenant could be procured from the limited applicants for a U-shaped unit department store building not adapted for other uses, with 4200 sq. ft. carved out of the principal facade; which new tenancy would have been impossible for many months or years because of untenantability by reason of necessary and expensive major building operations required in erecting (from subbasement to roof) separating walls on three sides between petitioner's property and the bankrupt's property (617 Fifth Avenue); and during such untenantability mortgage interest of $70,000 per year would have had to be found for the $1,750,000 mortgage, and city taxes of about $300,000 without rental to supply same, but

with imminent maturity of the mortgage itself; all of which would have jeopardized the very title and ownership of petitioner (Exh. B of CR1; PR1 pp. 3-4).

When that claim was rejected, suit in The Tax Court was brought which was tried before Judge Hill. There was no dispute as to the evidential facts, most of which were stipulated (pp. 16-22 PR1). Judge Hill found all the stipulated facts (PR1 p. 61). He also found all the facts shown by our uncontradicted evidence and testimony viz. that our tenant and its owners made pleas to us for reduction in rent and made representations of their debts and decreased sales and business losses in the preceding years of the depression, which threatened their continued solvency and the imperative need of our temporary reduction in tenant's rent to an amount which would enable tenant to avoid bankruptcy; that said representations were all true, and induced petitioner temporarily to reduce the reserved rental to what tenant could pay without bankruptcy (pp. 61-66 PR1).

Judge Hill made no clear or definite finding or conclusion on certain requisites of §722 viz. our normal income (rentals), its adequacy, or inadequacy, the measure of any inadequacy, and our fair constructive net income (which omission destroyed all support of his decision: *U. S. v. Pyne* 313 U. S. 127, 130: "Failure of the Court of Claims to make a specific finding on this ultimate and determinative issue deprives that Court's judgment of support").

All the facts that Judge Hill found were in our favor. His two comments unfavorable to our claim were (1) he conjured from nowhere and advanced for the first time by his opinion a novel and astonishing assumption, without basis whatever and herein affirmatively proved to be false (pp. 38a-39a), viz that petitioner was the kind of

corporation affected by subdivision (b) (3) to wit a member of an industry (see Point VII, *infra*); and from that assumption he discovered that our failure to prove (required only of members of an industry) that our profit or income cycle (which he must also have assumed to exist although repugnant to his finding that our rental was fixed at $300,000, p. 61, fol. 183 PR1, and repugnant to his finding that the principal source of our income was from this rent, p. 61, fol. 182 PR1) was materially different from that of business generally (which he also assumed to exist), forbade all relief to us under (b) (5) (pp. 67 fol. 200; 69 fol. 205-206 PR1).

POINT VII.

Petitioner was not a member of an industry.

The statutory words of (b) (3) "an *industry* of which the taxpayer was a *member*" are common words, whose meaning is unmistakable:

> *Crane v. Commissioner* 331 U. S. 1, 6:
>
> > "The words of statutes—including revenue acts—should be interpreted where possible in their ordinary everyday senses. The only relevant definitions * * * to be found in the principal standard dictionaries are * * *"

By the principal standard dictionaries "An industry" means:

Funk & Wagnall's New Standard Dictionary: "labor habitually or systematically employed in beneficial work, especially in the productive manufactures and arts; laborers as a body; as, organized industry; any single branch of productive activity; the labor and capital employed in a trade or department of business; as, the iron industry;

the farming industry; American industries. The mechanical and manufacturing activities as distinguished from the agricultural."

Webster's New International Dictionary: "4. Systematic labor or habitual employment, especially human exertion employed for the creation of value, regarded by some as a species of capital or wealth; labor. 5. Any department or branch of art, occupation, or business; especially one which employs much labor and capital and is a distinct branch of trade; as the sugar industry; the iron industry; the cotton industry; agricultural industries."

Century Dictionary: "2. Productive labor; specifically, labor employed in manufacturing; manufacturing; hence a particular branch of work; a trade; as the iron industry; the cotton industry; often used in the plural, of trades in general; as the arts and industries of a country."

By Regulation 112 §35.722-2(b) (8) (set out in vol. 463A of CCH par. 5142B p. 8253): "industry" is defined as follows:

> "For the purposes of §722** no exclusive definition of the concept 'industry' can be constructed. In general an industry may be said to include a group of enterprises engaged in *producing* or *marketing* the same or similar *products* or *services* under analogous conditions which are essentially different from those encountered by other enterprises * * *"

Judicially the word "industry" has never been defined to include an owner-lessor of two parcels of real estate without business except to collect and distribute rents. Petitioner is not even in the "business" of renting, for it merely rented one property once 32 years ago and its other property once 42 years ago, (pp. 35a fol. 105; 38a

fol. 113) and it will not be renting either property again for another half century unless a tenant fails to exercise his renewal option; it has no cycle because its reserved rentals were fixed by the lease until 1943 and could not increase for we could not share in tenant's gross or net sales, nor share in tenant's prosperity beyond our fixed rent—see stipulation of facts (p. 16 fol. 48-49 PR1) and Judge Hill's Findings (*id.* p. 61 fol. 181) that said lease was for a "fixed net annual rental of * * * $300,000 per year"; similarly as to rental from our only other property (p. 38a).

POINT VIII.

Our true measure of normality was the rental reserved in the lease of 1920; and the inadequacy was the reduction therein of $50,000 per year for four years.

Certainly until the first rental forgiveness on October 1st 1932 (Stipulation Art. 7 p. 18 Found p. 61 PR1) that reserved rent was the measure of normality (*Philadelphia, Germantown & Norristown R. R. Co. v. Commissioner,* 6 T. C. 789, 798 "The 'standard or normal earnings' for a period of 999 years from December 1st 1870 was actually established by the lease executed in 1870") for that rental was fixed until 1943 absolutely and fixed thereafter for nearly a century if tenant chose to renew that long; and certainly normal income from a long-term lease of valuable improved real estate in the choicest section of a continental metropolis where tenant is bound for 23 years and landlord for 107 years, cannot vary from day to day (like staples in a free market) as though there were no lease.

Our forgivenesses (1932-1935) were each expressly without effect on the reserved rental (Stipulation of Facts, No. 8 p. 19; Found p. 61 PR1). Nothing in the statute says or implies that subnormality in the base period must be the only subnormality of a taxpayer's lifetime, and no one has claimed that those pre-modification forgivenesses effected a change in normality. Intrinsically, and regardless of the *Philadelphia, Germantown & Norristown R. R.* case *supra,* petitioner's normal income couldn't be anything but the reserved rental (with or without recognition of the $15,000 per year which petitioner netted from the lease of the newly purchased property, see Finding pp. 63, 64 [a] [b] PR1)—or same plus proof that it was not inflated in relation to other neighborhood comparable properties—which additional proof Judge Hill held to be unnecessary (p. 57 fols. 168-169 PR1) but which the record shows was fully satisfied anyhow (see petition Ex. D CP1). The $15,000 question was not pursued; for the result for 1940, *though not for 1941-1944,* would have been the same whether $50,000 or $35,000 be added for the constructive base period net income (see figures of "rider to p. 1. item 7" of Ex-B attached to the petition (CR1) and Finding R. 65 PR1).

The temporary reduction for part of the unified building did not establish a superseding normality for reasons already stated in the petition (p. 4, *supra*) and here we add only certain supporting details omitted from the petition: The reducing agreement (Ex. 4 CP1—a half-page document) did not relate to normality of rent, but rather to what rent tenant could pay and remain solvent. Far from evidencing a normal or reasonable amount, the agreement and the events leading up to it, demonstrated that the reduced rent was subreasonable and subnormal in order, with the one million dollars cash paid over, to help preserve the solvency of the Gimbel group. That

very *purpose* was thus found by Judge Hill (Findings, R. 63, PR1):

> "In 1935 the Gimbel group represented to petitioner that it would be in danger of collapsing if petitioner did not agree to its plan for the concession in rent and the raising of liquid funds * * * *petitioner acted on the basis of these representations"*; (opinion, R. 67 PR1). "In 1935 representatives of the Gimbel group came to petitioner with a propsition, the result of which is set forth in detail in our findings. The proposal generally provided that petitioner purchase from the Gimbel group lot No. 617 for $1,000,000 and that it reduce the rental on the U-shaped property by $50,000 for 4-1/2 years beginning January 1, 1936. Such proposal was made to petitioner so that the Gimbel group, including petitioner's lessee, Saks & Company could reduce its funded debt thereby cutting down its fixed charges and permitting the organization to survive the effects of the general depression."

The evidence supporting those Findings is clear and uncontradicted. Thus the purpose of the plan was relief to the *tenant* (Ex. 1 letter of July 26 1932 CR1) and for solution of the *tenant's* problem (Ex. 1, letter of August 2 1932 CR1) which was a matter of such importance that items of expense were "of small moment compared with the importance of the transaction" (Ex. 1, letter of September 2 1932 CR1) which was danger of threatening failure (Ex. 1, letter of December 28 1933 CR1) and to replenish the treasury of the Gimbel group (same letter, p. 2). It was wholly a matter of kindness and consideration to the tenant (Ex. 1, letter of January 3 1934 CR1), "to avoid a process of strangulation of the tenant"; it was a *concession* on our part (Ex. 1, letter of February 12 1934, p. 2 CR1); continuing rental reduction was of vital importance (Ex. 1, letter of November 30 1934 CR 1); in order to reduce the Gimbel

group's indebtedness to controllable dimensions (same p. 2); "I do want to emphasize that your tenant is making heroic efforts to preserve and strengthen the integrity of the agency employed to earn rental on this property. In the process your clients strengthen their position not alone through helping their tenant but also through helping themselves by rounding out a property for other uses in the emergency of an untoward event attacking their present tenant. It would be a tragedy if failure of these efforts unwittingly led to the destruction of this tenant and the landlord had only a misfit property with which to face such a problem" (Ex. 1, letter of February 1 1935 CR1); "all of us recognize that (petitioner) have proven in unmistaken terms their *kindly* and *sympathetic* interest in the welfare of their *tenants*" (Ex. 1, letter of February 10 1935 CR1); "ten-year postponement of one-third the interest on Saks Realty Corporation 6s was a mild concession compared with a cancellation of one-third the ground rental on the same property" (Ex. 1, typed memo of Hayden, Stone & Co., signed "BEB, May 6 1935" CR1 and testimony of Horowitz, R. 38-39 PR1); "the necessity for strengthening Saks Fifth Avenue's financial structure remains of paramount importance" (Ex. 1, CR1 last document prepared by Horowitz and Gimbel, see Horowitz, R. 40 PR1); the words of petitioner's resolution were "Whereas in order to preserve the continued operation of its business by Saks Fifth Avenue" (Ex. 3, p. 3 CR1). It was *Gimbel Brothers* that sought the *relief;* it was the Gimbel group who sought on September 20 1935 to reopen the negotiations which had ended in an impasse in July 1935 (Andrews, R. 50; Lawson, R. 47 PR1) as "extremely necessary" *for the Gimbel group,* and that nothing but bankruptcy would result unless further rent *concessions* were made (R. 50-54, PR1).

Thus the evidence and Judge Hill's findings conclusively show without the slightest contradiction that our reduction of rent was a *concession* to save our tenant, and had no relation at all to reasonableness or narmality of rent but rather was made in spite of its subnormality; and proofs of normal rental were accepted and found by Judge Hill which destroyed all basis for regarding the reduction agreement as a standard or criterion of normal rental; for "at the same time" that the reduction agreement was made (Finding, R. 64 [a] PR1) the same parties made a new lease of part of the same "unified store building" (Stipulation Art. 4; Horowitz, R. 28-29; Found, R. 61, 62 PR1) for the same period and use at a rental nearly twice that of the reducing agreement; that is to say: under the lease of 1920 the U-shaped building (36770 sq. ft., Stipulation of Facts, Art. 1, Found, R. 61 PR1) was $300,000 per year until 1943, a rate of $8.15 per square foot per year; by the reducing agreement (Ex. 4 CR1) the rate was temporarily made $6.79 per square foot; but the simultaneous new lease of No. 617 Fifth Avenue (4,200 sq. ft., Stipulation of Facts, Art. 1, Found R. 61 PR1) was $55,000 per year, (Stipulation of Facts, 10b, R. 21; Found R. 61, 64 [a] PR1) a rate of $13.09 per square foot per year; and it is impossible that for different parts of the same "unified store building" the normal rental could, at the same moment and for the same term and the same landlord and tenant, be both $13.09 and $6.79 per square foot per year—amounts nearly 100% apart. The new lease must have reflected the parties' belief of present normal rental for a new $1,000,000 purchase; but the reduction agreement had no such purpose but exactly an opposite one. To reverse their roles and then attribute to the latter a conclusive effect in its alien role, while ignoring or overlooking the former, which alone had any relevancy to normality, was the unjust effect upon us.

POINT IX.

There was no collateral estoppel, and the writ should issue.

September 14, 1953.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 348

GEORGE KEMP REAL ESTATE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (Pet. App. 40–53)[1] is reported at 17 T. C. 755. The *per curiam* opinion of the Court of Appeals (Resp. App. 61) is reported at 205 F. 2d 236.

[1] The reference to "Pet. App." is to those portions of the record printed as a separately bound appendix to the brief for the petitioner in the court below. "Resp. App." refers to those additional portions printed as an appendix (pp. 37–60) to the respondent's brief in the court below, following which the proceedings in the court below have been printed (pp. 61–62).

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1953. (Resp. App. 62.) The petition for a writ of certiorari was filed on September 16, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the Tax Court's decision in a prior case, involving the taxpayer's claim for relief under Section 722 of the Internal Revenue Code with respect to excess profits tax for the year 1940, estopped the taxpayer from litigating in that court on the same grounds its right to relief under Section 722 with respect to excess profits taxes for the years 1941 through 1944—no change in the relevant facts or controlling law having intervened.

STATUTE INVOLVED

The pertinent provisions of the statute are set forth in the Appendix, *infra*, pp. 11–15.

STATEMENT

The taxpayer sought a redetermination of the disallowance by the Commissioner of its application for relief under Section 722 of the Internal Revenue Code (Appendix, *infra*, pp. 11–15) with respect to excess profits taxes paid for the years 1941 through 1944 (Pet. App. 4–17, 40). The case was heard by the Tax Court upon the sole

issue[2] whether the decision by that court in an earlier proceeding (*infra*, pp. 5–6),[3] to the effect that the taxpayer was not entitled to excess profits tax relief under Section 722 for the year 1940, collaterally estopped the taxpayer from being heard on its contention that it was entitled to relief under Section 722 with respect to the years 1941 through 1944.

The facts which had been found by the Tax Court in the earlier case were substantially the same as those which were alleged in the taxpayer's petitions in both cases. Indeed, the taxpayer conceded in this case that "every fact" on which it relied had been found by the Tax Court in the earlier case. (Pet. App. 41.) Those facts—summarized in the opinion of the Tax Court in this case (Pet. App. 41–45)—may be stated briefly as follows:

Since about 1903, the chief source of income of the taxpayer has been from rentals of property owned by it, comprising, except for a 42-foot front strip, an entire block facing on Fifth Avenue, between 49th and 50th Streets, in New York City. In 1920 the property had been leased to Saks &

[2] The Commissioner moved the Tax Court to sever the issues (Pet. App. 28–31), requesting a separate hearing first upon this issue. The Tax Court, after hearing, granted that motion and subsequently heard the cause upon the issue thus severed (Pet. App. 2, 40–41).

[3] The entire record in that prior case was admitted in evidence in this case as Respondent's Exhibit A. Certain excerpts therefrom are printed in Resp. App. 37–60.

Company, at a net rental of $200,000 a year to May of 1924, and $300,000 a year thereafter, the lease being for 21 years, with several renewal periods of 21 years each, at the option of the lessee. The lessee, under the lease, had constructed a unified building on the taxpayer's property and on the 42-foot strip not owned by the taxpayer. (Pet. App. 41–42, Resp. App. 47–48.)

The lessee was owned by Gimbel Brothers, Inc., which also owned several other department stores in New York and other cities. During the general business depression after 1931, the Gimbel group, including Saks, suffered severe financial reverses. Heavy fixed charges, particularly rent and mortgage interest, had to be scaled down, beginning in 1932, and by 1935 the Gimbel group was kept in business only by the concessions made by its lessors and mortgagees, all of whom had agreed to reductions. The taxpayer had made concessions in the rental for its U-shaped Fifth Avenue property in each of the years 1932 through 1935.[4] (Pet. App. 42, Resp. App. 48–49.)

Upon representations by the Gimbel group that it was in danger of collapsing if the taxpayer did not agree to a more permanent rent concession and did not buy the 42-foot strip, the taxpayer in December 1935 entered into a written agreement whereby, amongst other things, it agreed to reduce the rental by $50,000 a year on the U-

[4] Those concessions aggregated $250,000 for those four years (Resp. App. 48–49).

shaped property from December 1, 1935, to June 30, 1940, and the taxpayer bought the 42-foot strip from the Gimbel group. Reductions in rent during the depression were quite frequent in respect of comparable properties, and in fact every other lessor of the Gimbel group had reduced its rent. (Pet. App. 42, Resp. App. 49–50.)

On these facts, in the earlier proceeding, the taxpayer asserted a right to relief under Section 722 on the ground that the $50,000 concession in annual rental which had been made by it to its tenant rendered its base period (1936–1939) net income an inadequate standard of normal earnings. The taxpayer consequently sought, through the aid of Section 722, to increase by $50,000 its average base period net income in the computation of its excess profits tax liability for each of the taxable years.[5] This contention was rejected on the merits by the Tax Court in the first proceeding, *George Kemp Real Estate Co.* v. *Com-*

[5] Under the so-called Second World War excess profits tax law which (as a new subchapter, Subchapter E—Excess Profits Tax) was added to the Internal Revenue Code by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, and which was in force with respect to taxable years beginning after December 31, 1939, and before January 1, 1946 (see Section 122 of the Revenue Act of 1945, c. 453, 59 Stat. 556), a tax was imposed at high rates on all profits above a certain credit which was computed either upon the basis of average income for a designated base period (the years 1936 through 1939) or a percentage of invested capital, whichever resulted in the lesser tax—except that relief from the resultant tax was allowed for certain "abnormalities," principally by Section 722.

missioner, 12 T. C. 942; the Court of Appeals for the Second Circuit, upon motion by the Commissioner, dismissed the taxpayer's petition to review for lack of jurisdiction (182 F. 2d 847); and this Court denied certiorari (340 U. S. 852).

On substantially the same allegations of error,[6] and, as noted, on the same facts, the taxpayer sought in this proceeding precisely the same relief for the taxable years 1941 through 1944. The Tax Court denied the relief, holding that its earlier decision on the merits estopped the taxpayer from litigating again in this case its claimed right to relief under Section 722 (Pet. App. 44–53). The Court of Appeals for the Second Circuit affirmed *per curiam* (Resp. App. 61).[7]

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[6] In the first case, the taxpayer had set forth somewhat extended and detailed allegations of error, attacking the Commissioner's disallowance of its claim for relief under Section 722 (a) and (b) (5) of the Code, while in the instant case the errors are alleged much more briefly but in substance are the same.

[7] The court below also expressed its view that it had jurisdiction to review the decision of the Tax Court in the instant case "despite the provisions of § 732 (c) of the Internal Revenue Code". (Pet. App. 61.) The Commissioner, although not in this case affirmatively challenging the jurisdiction of the court below or moving to dismiss for lack of jurisdiction—as he had done, successfully, in the prior case (see 182 F. 2d 847)—had merely brought to the attention of the Court of Appeals the fact that there might be a question as to its jurisdiction to review in view of the provisions of Section 732 (c).

ARGUMENT

The court below was clearly correct in sustaining the Tax Court's holding that the taxpayer was precluded from relitigating on the merits in this case its claimed right to excess profits tax relief for the years 1941 through 1944. The question litigated and decided on the merits in the prior case, as to the year 1940, was identical in all respects with that which the taxpayer endeavored to litigate again in the instant case with respect to the years 1941 through 1944. As there had been no intervening change in the governing legal principles,[8] the application of the bar of estoppel by judgment was clearly correct. See *Commissioner* v. *Sunnen,* 333 U. S. 591; *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620; and *Cromwell* v. *County of Sac,* 94 U. S. 351. Cf. *United States* v. *International Building Co.,* 345 U. S. 502, rehearing denied, 345 U. S. 978.

Seeking to avoid the inevitable result of the application of the settled principles of estoppel

[8] No applicable decision intervened to bring about any change nor was there any change in either the statute or regulation. Section 722 of the Code, although repeatedly amended, was, as finally amended, so amended to apply retroactively to all taxable years beginning after December 31, 1939; and the pertinent provisions of Sections 35.722–1, 35.722–2 and 35.72–3 of Treasury Regulations 112, applicable to taxable years beginning after December 31, 1941, were identical with the corresponding provisions of the Regulation applicable to prior years, Sections 30.722–1, 30.722–2 and 30.722–3 of Treasury Regulations 109, as amended by T. D. 5264, 1943 Cum. Bull. 761.

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by judgment in the instant case, the taxpayer has contended (Pet. App. 45, 51–52, 55–62; Pet. 2, 3–4) that in the prior case there had been "no issue directly pleaded, raised, litigated, found or decided" with respect to the matter which, the taxpayer asserted, the Tax Court "found essential to its decision, namely, the postulate that the petitioner was a member of an industry engaged in production within the meaning of Code section 722 (b) (3)" (Pet. App. 45).

The point is without merit, as the Tax Court aptly demonstrated (Pet. App. 45–47, 51–53). In the prior case the taxpayer had contended that it was entitled to relief under Section 722 (a) and (b) (5) (Appendix, *infra*, pp. 11–12, 14). The Tax Court had necessarily and properly noted in its opinion the provision of subsection (b) (5) which has been frequently referred to as the "consistency test"—namely, that relief may be granted only if "the application of this section to the taxpayer would not be inconsistent with the principles underlying the provisions of this subsection, and with the conditions and limitations enumerated therein." Accordingly, the Tax Court in applying that test had referred to subsection (b) (3) (A) (Appendix, *infra*, p. 12), which lays down the "variant profits cycle" test, *i. e.*, that the taxpayer must have been subjected

to a "profits cycle differing materially in length and amplitude from the general business cycle" in the industry of which the taxpayer was a member. The Tax Court had concluded that the taxpayer had not shown this difference in cycle (Pet. App. 52; see also Resp. App. 51–55).

The taxpayer contended in the prior case, as now, that it met the consistency test of subsection (b) (5), in that the variant profits cycle test of (b) (3) (A) was not applicable to it, as it was not a "member of an industry engaged in production." See Resp. App. 40, 41, 43, 44–45, 55–57, 59–60. This contention was rejected in the prior case, and the only possible difference in taxpayer's position in this regard is that here the taxpayer has elaborated more fully upon its contention that it is not "a member of an industry."[9]

[9] While, of course, the merits of the taxpayer's claim for relief under Section 722 are not here, it may be observed that the point is wholly untenable, in that it rests upon an unusually and peculiarly restricted meaning which the taxpayer would accord to the term "an industry" used in Section 722. It is obvious that the term in the statute was used in the general sense, so as to refer to a group of enterprises engaged in a similar activity or similar business. See Section 35.722–3, Treasury Regulations 112; see the Treasury Department's Bulletin on Section 722 of the Internal Revenue Code (November 1944), pp. 3, 4, 7–8, 20, 22–23.

CONCLUSION

The decision below is correct, and is in accord with the controlling principles heretofore enunciated by this Court. There is no conflict of decisions, and no question calling for review by this Court is presented. The petition should, therefore, be denied.

Respectfully submitted.

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OCTOBER 1953.

APPENDIX

Internal Revenue Code:

CHAPTER 1—INCOME TAX

* * * * *

CHAPTER 2—ADDITIONAL INCOME TAXES

* * * * *

SUBCHAPTER E—EXCESS PROFITS TAX

[As added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, which provided that the new subchapter may be cited as the "Excess Profits Tax Act of 1940", as amended].

* * * * *

SEC. 722. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the

average base period net income otherwise determined under this subchapter. * * *

(b) *Taxpayers Using Average Earnings Method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

(1) in one or more taxable years in the base period normal production, output, or operation was interrupted or diminshed because of the occurrence, either immediately prior to, or during the base period, of events unusual and peculiar in the experience of such taxpayer,

(2) the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry,

(3) the business of the taxpayer was depressed in the base period by reason of conditions generally prevailing in an industry of which the taxpayer was a member, subjecting such taxpayer to

(A) a profits cycle differing materially in length and amplitude from the general business cycle, or

(B) sporadic and intermittent periods of high production and profits, and such periods are inadequately represented in the base period,

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. If the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. For the purposes of this subparagraph, the term "change in the character of the business" includes a change in the operation or management of the business, a difference in the products or services furnished, a difference in the capacity for production or operation, a difference in the ratio of nonborrowed capital to total capital, and the acquisition before January 1, 1940, of all or part of the assets of a competitor, with the result that the competition of such competitor was eliminated or diminished. Any change in the capacity for production or operation of the business consummated during any taxable year ending after December 31, 1939, as a result of a course of action to which the taxpayer was committed prior to January 1, 1940, or any acquisition before May 31, 1941, from a competitor engaged in the dissemination of information through the public press, of substantially all the assets of such competitor employed in such business with the result that competition between the taxpayer and the competitor existing before

January 1, 1940, was eliminated, shall be deemed to be a change on December 31, 1939, in the character of the business, or

(5) of any other factor affecting the taxpayer's business which may reasonably be considered as resulting in an inadequate standard of normal earnings during the base period and the application of this section to the taxpayer would not be inconsistent with the principles underlying the provisions of this subsection, and with the conditions and limitations enumerated therein.

* * * * *

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose

of determining the tax under this subchapter for a subsequent taxable year.[10]

* * * * *

(26 U. S. C. 1946 ed., Sec. 722.)

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[10] The quoted portions of Section 722 (a) and (b) are as finally amended by Section 222 of the Revenue Act of 1942, c. 619, 56 Stat. 798. The provisions relative to the procedure for applying for relief under Section 722 as quoted above in subsection (d), are as finally amended by the Act of December 17, 1943, c. 346, 57 Stat. 601. All of the amendments reflected above were made applicable with respect to all taxable years beginning after December 31, 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1950